Supreme Court, U.S.
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No. 93-1455

In The

Supreme Court of the United States

October Term, 1993

MARY HAYES, AS ADMINISTRATOR,
PARENT AND NEXT FRIEND OF
ROBERT HAYES, JR., DECEASED AND ERIC HAYES,

Petitioners,

v.

DOUGLAS DYNAMICS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT DOUGLAS DYNAMICS, INC. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Does Rule 705 prohibit a court (in the context of a Summary Judgment motion) from screening and thereafter rejecting, pursuant to the standards of Rule 56, conclusory and factually unsupported opinions of the non-moving party's experts.

II. Was the District Court correct in awarding Summary Judgment to the Respondent upon a showing that the Petitioners' experts' opinions (on the issue of proximate cause) were devoid of any factual basis or process of reasoning to support their conclusory assertions without requesting further submissions by the Petitioners.

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Respondent, Douglas Dynamics, Inc., respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of a decision of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

On January 30, 1988, an automobile accident involving three vehicles occurred on Route 28 in Randolph,

Massachusetts. One vehicle was a full size Chevrolet truck (hereinafter, the "truck") driven by William Richardson with an attached snow plow lift mechanism (hereinafter, the "lift mechanism") allegedly manufactured by the Respondent, (which fact the Respondent for purposes of its summary judgment motion did not dispute) minus the plow. One vehicle was a Ford Tempo (hereinafter the "Tempo") in which Eric Hayes was seated in the left rear and Robert Hayes, Jr. was seated in the right rear. The third vehicle involved in the accident was a full sized Chevrolet van (hereinafter the "van").

The Tempo was stopped on Route 28 in Randolph facing north, awaiting an opportunity to make a left hand turn. The truck approached in a northerly direction from behind the Tempo and struck the right rear bumper area of the Tempo with the left front bumper area of the truck. Sergeant Gerard Murphy, an accident reconstructionist with the Massachusetts State Police, did an analysis of the accident for the criminal case against the truck driver and determined that the speed of the truck at the point of impact was 41.2 miles per hour (App. 1). (Contrary to the implication in the Petitioners' petition, Sargeant Murphy did not attempt to analyze the role of the lift mechanism with regard to the accident or the injuries to Robert Hayes, Jr.)

The impact of the full size truck on the rear of the Tempo catapulted the Tempo in a leftward arc across the center line into the oncoming southbound traffic on Route 28 where the Tempo collided with the southbound van. During the second impact, the Tempo was struck in the area of the right front wheel by the van causing the Tempo to spin an additional 180 degrees in a counterclockwise direction before coming to rest (for a total of

approximately 270 degrees rotation of the Tempo). The Petitioners contend that the presence of the lift mechanism caused physical injuries to Robert Hayes, Jr. by either directly striking Robert Hayes, Jr. on his head or causing crumpled sheet metal of the Tempo to strike Robert Hayes, Jr. on his head resulting ultimately in his death and thereby causing psychological injuries to Eric Hayes. The Petitioners' counsel has never argued that Eric Hayes received any physical injuries because of the presence of the lift mechanism and thus the Respondent, in its motion for summary judgment, only addressed the issue of the proximate cause of the physical injuries received by Robert Hayes, Jr.

The Respondent's position from the filing of its summary judgment motion (on January 13, 1992) has always been that insufficient factual, observed or photographic data existed from which the Petitioners' experts could conclude without resorting to conjecture or speculation that the lift mechanism proximately caused the death of Robert Hayes, Jr.

A. None of the Accident Scene Witnesses Observed Either Signs of Head Bruising or Trauma or Any Damage to Any of the Vehicles Relating to the Role, if any, in the Accident of the Lift Mechanism.

Very shortly after the accident, Sargeant Paul Porter of the Randolph Police arrived on the scene and approached the vehicle to check on the four occupants. At that time, he observed a right rear roof pillar (a structural support from between the side rear window and the rear window) of the Tempo bent over pressing down on the

head of Robert Hayes, Jr., at the point behind his right ear where Sargeant Porter observed the only bruise on Robert Hayes, Jr.'s skull during the autopsy (App. 2-5). At his deposition, Officer Porter was asked whether he observed any particular damage to either the Tempo or the truck to indicate whether the lift mechanism had penetrated the passenger compartment of the Tempo or what role, if any, the lift mechanism played in the damage to the vehicles or the injury to Robert Hayes, Jr. Officer Porter admitted that he had not made any factual observations of the damage to either of the vehicles with regard to the lift mechanism. Officer Porter further admitted that he had seen no evidence when he examined the Tempo to indicate whether the lift mechanism entered the passenger compartment (App. 6).

The only other police officer who investigated the accident was Officer Charles Thistle who wrote an accident report for the Randolph Police Department. When questioned at his deposition, Officer Thistle also admitted that he had not seen any evidence, when he examined the Tempo, to indicate that the lift mechanism had entered the passenger compartment or that the lift mechanism had even impacted the back of the Tempo, let alone the head of Robert Hayes, Jr. Further, Officer Thistle made no observations with regard to any particular damage done to any part of the lift mechanism on the front of the truck (App. 7-8).

The truck driver, William Richardson, also did not make any relevant observations. He testified at his deposition that he couldn't see the impact of the lift mechanism on the Tempo because the lift mechanism did not extend above the hood of the truck and he made no

observations as to damage to the lift mechanism after the accident (App. 9-10).

Next on the scene were the Randolph Fire Department EMT's, William O'Neil and Alan Royer. Both O'Neil and Royer were deposed and both testified that they observed no cuts, bruises or blood on the head of Robert Hayes, Jr. when they examined him at the scene. Also, both individuals testified that they made no observations of the condition of any of the three vehicles involved in the accident while they were treating Robert Hayes, Jr.

Thus, none of the witnesses at the scene of the accident provided any factual observations for the Petitioners' experts to use in reaching their conclusions.

B. None of the Hospital Personnel Noted Any Observations of Head Trauma to Robert Hayes, Jr.

Shortly after the accident, Robert Hayes, Jr. was taken by ambulance to the Milton Medical Center, Milton, Massachusetts. The Milton Medical Center records indicate that there were no external signs of head or facial trauma to Robert Hayes, Jr. (App. 11, Lines 7-8 under "History and Medical Exam" Section of Emergency Room Record). Nor do the records from the Massachusetts General Hospital (to which Robert Hayes, Jr. was air-lifted), include any observations of external head trauma.

Thus, the Petitioners' experts have no accident scene witness observations of damage to the vehicles or medical personnel observations of head trauma or other relevant injury to Robert Hayes, Jr., during the two days following the accident while he was still alive, upon

which to base their opinions that the lift mechanism hit Robert Hayes, Jr. The only medical person to observe any evidence of even a contusion to the decedent's head was the doctor who performed the autopsy after numerous organs had been removed for transplants. The Petitioners' experts base their opinions on police photographs and such "facts" as: the Respondent's product is an "energy focusing device" which, because of that characteristic, "must" have caused the massive damage to the back of the Tempo and thus "must" have caused the lift mechanism to actually strike the head of Robert Hayes, Jr. or in the alternative, to cause crumpled sheet metal to strike the head of Robert Hayes, Jr. This, without any observations of any head trauma to Robert Hayes from the time of the accident until after his death, some two days later.

Tellingly, none of the Petitioners' experts mention any of the witnesses except for Sargeant Porter and then to summarily dismiss Sargeant Porter's observation of the roof pillar pressing against the head of Robert Hayes, Jr. in the area where the bruise was observed some two days later.

The only actually observed facts which only one of the Petitioners' experts notes are measurements made by a photographic analyst (Huett) that the rear bumper of the Tempo was pushed forward "approximately" 15 inches at the left end and "at least" 30 inches on the right end and that the rear seat back was moved forward "approximately" 11.5 inches on the left and "approximately" 24 inches on the right. The rest of the experts' "facts" consist of photographs of a truck and a Tempo placed next to each other where the experts speculate the

vehicles were in relationship to each other at the time of the accident. Those staged photographs depict experts' *conclusions*, not the factual *basis* for the conclusions.

SUMMARY OF ARGUMENT

Petitioners have, in essence, two objections to the decision of the First Circuit. The Petitioners allege that: 1) the court weighed the credibility of the Petitioners' experts' affidavits on deciding the motion for summary judgment brought by the Respondent; and 2) the court failed to provide the Petitioners with an adequate opportunity under Rule 705 to provide additional factual support for their experts' opinions prior to ruling on the Rule 56 motion.

This Court should deny the petition because the First Circuit did no more than fulfill its "gate-keeping" duties regarding expert testimony as described in this Court's decision in *Daubert vs. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786, 2794 (1993). The Petitioners also distort the First Circuit's ruling to support their claim that a conflict exists between the circuits on the two issues described above. However, the circumstances of this case are inapposite to the cases cited by the Petitioners. Also, all of the cases cited by Petitioners either pre-date the *Daubert* decision, or to the extent a conflict between the circuits did exist, the *Daubert* decision resolved it. Further, the First Circuit remained within the parameters set out in the *Daubert* opinion on the issue of evaluating the reliability of the proffered expert opinions. Contrary to the Petitioners' position, a trial judge is not required, in

the context of a Rule 56 motion, to accept any expert opinion, no matter how speculative, offered by the non-moving party.

The Petitioners' second claim of error is equally without merit. The District Court did not fail to afford the Petitioners an adequate opportunity to *supplement* their expert opinions (contained in the affidavits of those experts) and no conflict between the First Circuit's decision and other circuits on this issue exists. First, Rule 705 does not *require* a court to provide a further opportunity to a non-movant (in the context of a motion for summary judgment) to supplement expert affidavits with further facts. Secondly, the cases in which summary judgment was reversed and the non-movants given a second chance cited by the Petitioners for their interpretation of Rule 705 are easily distinguishable on their facts from this case (generally, on the issue of the extent of the opportunity that the non-moving parties had to respond to the moving parties' motions).

The Petitioners' position from the beginning has always begged the question and ignored Respondent's primary point: there were insufficient facts observed by witnesses or information contained in scene photographs from which to conclude, without speculation, that the path of the lift mechanism intersected with the path of the head of Robert Hayes, Jr. Instead, the Petitioners have always argued that their experts' qualifications are impeccable, that their experts "methodology" is accepted in the field of accident reconstruction and that therefore, their expert conclusions are valid. Like the emperor's tailors in the fairy tale, the Petitioners' experts claim great expertise, and that only the finest craftsmanship goes into their work. However, Petitioners' experts presented their "wares" before both the District

Court and the First Circuit, and, like the child in the crowd watching the parade in the fairy tale, the experts' affidavits were correctly found to be as transparent as the emperor's new clothes.

REASONS FOR DENYING THE WRIT

A. The District Court and the First Circuit Court of Appeals Properly Performed Their Screening Duties Concerning the Adequacy of the Petitioners' Experts' Opinions in the Context of a Rule 56 Motion.

The Petitioners twist Rule 705 and argue that any evaluation of expert opinions is forbidden. In that argument, the Petitioners ignore Rule 702 and the *Daubert* holding on the issue of evaluation of the sufficiency of expert opinion affidavits in the summary judgment context. Under the *Daubert* holding, the trial judge retains an important "gate keeping" ability and duty.

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.[7] Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.
>
> [7] THE CHIEF JUSTICE 'do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility,' . . .

Id. at 2794-2795 [brackets in original].

In explaining that gate-keeping obligation, this Court specifically affirmed that a trial court has the obligation to determine and assess the "scientific knowledge" on which experts may testify and that it must be "more than subjective belief or unsupported speculation" *Id.* at 2795.

As set forth above in the statement of the case, the Petitioners' experts refer to only general observations relating to the violent, double collision itself (such as the truck "struck" the rear of the Tempo and the Tempo was struck on the front left by the Chevrolet van). However, the experts do not have specific facts or observations about the accident such as the placement of the vehicles at points of impact; the angles of the vehicles at either impact; the overlap of the vehicles; how much of the truck came in contact with the Tempo; or the position of Roberts Hayes, Jr. at any time during the violent three car accident to form their opinions without relying on irrelevant generalities. The "facts" heralded by the experts include "the truck crushed the rear of the Tempo." (N. Miller, Petitioners' A. 39). "The lift mechanism was damaged in the collision . . . " (N. Miller, Petitioners' A. 39). Observations, such as the above, provide no basis for a conclusion that the lift mechanism struck Robert Hayes, Jr. The Petitioners' lead expert Nicholas Miller's most circular "fact" on which he bases his conclusions is simply a restatement of his conclusion: "It is apparent as an observable fact that the lift mechanism attached to the truck reached and invaded the right rear seat at head height and would have struck the right rear passenger". (Petitioners' Appendix at 40a). The Petitioners' appendix includes four photographs of a truck and a Tempo placed (presumably by Miller) next to each other as "proof" that

the lift mechanism struck the decedent, Robert Hayes, Jr. As the District Court stated, far from it being an "observable fact", such photographs depict merely a conjectural opinion.

The most glaring omission in all of the Petitioners' evidence was the lack of any depiction in a photograph of the "accumulated" sheet metal which the experts claim, in the alternative, protruded into the passenger area of the Tempo and struck Robert Hayes, Jr.

The District Court and the First Circuit properly reviewed the expert affidavits and correctly rejected them as speculation and conjecture and insufficient to pass the test on summary judgment. That review was not of the credibility of the experts as claimed by the Petitioners, but of the factual support for those opinions, a perfectly proper exercise of the "gate-keeping" duties described in the *Daubert* opinion. The Petitioners' experts' protestations of expertise and methodology are merely an attempt to mask the fact that their opinions are unsupported speculation.

B. Petitioners Were Given More Than Enough Opportunities to Provide a Factual Basis for Their Expert Opinions and When They Failed Utterly to do so, the District Court Appropriately Granted the Respondent Summary Judgment.

The Petitioners also argue that in derogation of Rule 705, they were denied an opportunity by the District Court to provide more facts in support of their expert opinions. The Petitioners claim that Rule 705 gives nonmovants, in the contents of a summary judgment motion,

the *right* to notice by the court of the inadequacy of their expert affidavits prior to the court ruling on the Rule 56 motion as well as the *right* to supplement their opposition with additional material thereafter. However, the Rule simply does not create such a right.[1] Further, decisions cited by the Petitioners do not stand for such an interpretation of that Rule. Regardless of the Petitioners' interpretations of Rule 705, unlike the complaining parties in the cases cited by the Petitioners, the Petitioners had repeated opportunities to supplement, elaborate and augment their materials in opposition to Respondents' motion and they took liberal advantage to do so during the 5 months between the filing of the motion for summary judgment and the District Court decision on the motion.

In the instant case, Petitioners had ample opportunity to provide all the facts at their disposal. After extensive discovery by both parties, the discovery deadline came on October 22, 1991 (some three months before the Respondent's motion for summary judgment was filed on January 13, 1992). Thus it cannot be said that the Petitioners were "railroaded" into summary judgment as they imply. Had there been additional discovery necessary, the Petitioners could have filed a motion under Rule 56(f). However, they never filed such a motion. The

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[1] Rule 705 – The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (Jan. 2, 1975, P.L. 93-595, sec. 1, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987).

Respondent's position from the filing of its summary judgment motion has been that there are no available facts from which to conclude, without speculation, that the Respondent's lift mechanism caused the death of Robert Hayes, Jr. Contrary to the Petitioners' argument, the issue of insufficient facts to support expert opinions was first raised initially and repeatedly thereafter by the Respondent, *not* by the District Court out of thin air in its opinion.

During the period between January 13, 1992 and June 5, 1992, on which date the District Court issued its ruling, the Petitioners filed an avalanche of documentation beginning with their first response to Respondent's motion on February 12, 1992. On that date, the plaintiff filed an opposition affidavit of Petitioners' counsel along with a cross motion for summary judgment, and a motion requesting findings of fact accompanied by a two volume appendix of exhibits, affidavits, photographs, deposition transcript excerpts and other documents *totalling 465 pages*. On February 24, 1992, Petitioners filed the following additional documents: a "corrected affirmative" statement of facts regarding Respondent's motion for summary judgment; a motion for "finding of facts not in dispute" and for partial summary judgment; a "corrected" statement of facts in support of Petitioners' "motion for fact finding and partial summary judgment on liability"; a "corrective" memorandum in opposition to Respondent's motion for summary judgment; and a "corrective" appendix for volume II of the exhibits filed originally in opposition to Respondent's motion for summary judgment.

Upon motion, Respondent filed a reply brief to Petitioners' opposition to summary judgment on March 6,

1992. In that reply, the Respondent set out in detail its unchanged position that despite all the documentation and affidavits, reports, photographs and memoranda filed by the Petitioners, neither Petitioners' counsel (who offered more speculative opinions than their experts) nor Petitioners' experts had yet provided any factual basis for their opinions. Further, on March 24, 1992, the Respondent filed its opposition to Petitioners' cross motion for summary judgment on liability. The central theme for that opposition was, again, that the Petitioners' experts had not identified any observed factual basis for their speculative and conclusory opinions. In response, the Petitioners filed yet another set of three (3) expert affidavits on April 1, 1992.

On May 13, 1992, not content with their fourteen (14) prior expert reports/affidavits, already filed, the Petitioners filed a motion to supplement, yet again, their opposition to Respondent's motion for summary judgment specifically requesting to be allowed to file a fourth affidavit of Nicholas Miller (accident reconstructionist) with glossy prints of photographs and a third affidavit of Norris Shoemaker, (accident reconstructionist) with exhibits. This motion was allowed by the court, thereby bringing to sixteen (16), the number of expert affidavits/reports from six (6) different experts filed with the District Court prior to the Court's decision.[2]

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[2] The Petitioners motioned the District Court after its decision on summary judgment to vacate the judgment for purposes of filing five (5) additional affidavits and three pages of deposition transcript. The District Court denied that motion. The First Circuit affirmed that denial. However, the Petitioners have included those five (5) additional affidavits and selected portions of the deposition testimony at their Appendix p. 45-63.

None of those affidavits/reports (four (4) by Miller; two (2) by Farrell; two (2) by Huett; four (4) by Ommaya; three (3) by Shoemaker; and one (1) by Feigin) ever listed more than the two (2) factual observations (about the bumper and rear seat being pushed forward) on which it was claimed the experts' opinions were based. The accident reconstructionists, as opposed to the medical experts, all follow the same simplistic analysis that because the plow lift mechanism was an "energy focussing" component on the front of the truck, the mechanism must have penetrated the passenger compartment and struck the decedent. This, without any evidence of external head trauma being observed by any of the medical personnel except the coroner (Feigin) two days later, ignoring that the truck weighed approximately twice what the Tempo weighed, ignoring that the Tempo was stopped and the truck was going 41.2 mph at the point of impact, ignoring that the Tempo was thrown into the path of the on-coming full size Chevy van which, in turn slammed into the Tempo, spinning it 180 degrees instantly, and discounting in a single sentence by Miller, in one of his four (4) affidavits, the observation at the scene by Sargeant Porter of the roof pillar pressing down on the back of Robert Hayes, Jr.'s head right where the coroner reported the only evidence of a contusion existed. The Petitioners point to the crumpled rear of the Tempo and claim, through their experts, (all of whom the Petitioners' attorneys have used in other claims against the Respondent), in a giant leap of speculation that the lift mechanism struck the decedent and caused his death.

Thus, there was no ambush of the Petitioners regarding insufficient facts to support their experts' opinions.

The Respondent proclaimed the insufficient factual basis for the Petitioners' experts' opinions in its motion for summary judgment on January 13, 1992 with specificity and clarity detailing each of the experts' opinions provided to Respondent at that time and detailing the absence of any specific facts to support the conclusions.

The Petitioners, over the following five months, offered every fact known by anyone about the accident or the Respondents' product, relevant or not, including deposition transcripts from other law suits, police reports and photographs from accidents in other states. Tellingly, the Petitioners' experts ignored all of those materials other than to argue that the Respondent's lift mechanism is alleged to have caused other injuries and thus it must have done so in this case. Yet the experts still failed to articulate one relevant fact to support their conclusion that the Respondent's product struck the decedent or, in the alternative, (adopted by the Petitioners' part way through the process) that the Respondent's product caused crumpled sheet metal to strike the decedent, Robert Hayes, Jr.

C. The Respondent Sustained its Burden on Summary Judgment.

The Petitioners put great emphasis on the Respondent's "failure" to offer its own expert opinions in support of its motion for summary judgment. However, the Respondent satisfied its burden by simply showing an absence of an adequate basis for the Petitioners' experts' opinions.

The Respondent did not need to attack the Petitioners' experts' qualifications. The Respondent did not need to attack the Petitioners' experts' "methodology" (even though it was never even described by the Petitioners' experts), as the Respondent's burden on a Rule 56 motion was limited to pointing out to the District Court that there was an absence of evidence to support the non-moving party's case. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 325 (1986). Under the circumstances, a Rule 56 motion was perfectly appropriate. ("One of the principal purposes of the Summary Judgment rule is to isolate and dispose of factually unsupported claims. . . . ") *Id.* at 323.

For their conclusions that the lift mechanism struck Robert Hayes, Jr., directly or in the alternative (which one is it?) that the lift arm thrust sheet metal like a steel glove on a hand into Robert Hayes, Jr.'s head, the experts rely on each other's conclusions (not facts) or on a very few selected photographs (reproduced in Petitioners' Appendix). However, the Petitioners did not produce photographs of the crumpled metal glove allegedly thrust into the passenger compartment; or photographs of blood or hair on the lift mechanism; or photographs of a fractured skull or of a bloody gash in the back of the decedent's head, not because the Petitioners had no time or opportunity to get those photographs or observations before the court ruled, but, because no such evidence exists.

When examined, all of the Petitioners' experts affidavits were found by both the District Court and the First Circuit to be circular, beginning not with a *factual basis* for proximate cause, but beginning with a *conclusion* of proximate cause.

The District Court and the First Circuit properly reviewed the expert affidavits and correctly found them to be without the necessary "factual basis and the process of reasoning which makes the conclusion[s] viable in order to defeat a motion for summary judgment". *Hayes vs. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993). Also, the Petitioners had every opportunity to offer all of the factual support at their disposal and were not, as they claim, improperly denied a chance to offer more.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ANNEXED TO DEFENDANT'S STATEMENT OF MATERIAL FACTS – PAGE 31 FROM DEPOSITION OF GERARD MURPHY.

(234a of the Record)

Q. What's next part of that page?

A. The next part of that page is vehicle number one, and it's just, again, boxed tabulation.

One column says impact speed forward and it breaks it down into forward and lateral components. It gives impact speed for vehicle number one of 41.2 miles per hour.

Q. Did you input that?

A. No. That was calculated by the computer and it gives that back.

Q. Are any of these numbers numbers that you input?

A. No, this is output. Even the warning message and the energy that came under the warning message, that's output from the computer.

Q. Would you explain for me the speed change, the total?

A. Longitudinal and lateral. In other words, speed change or momentum or energy force or vector quantities. Vector means as a direction. So it's breaking that component of velocity in two directions, a longitudinal or horizontal component through the car and a lateral component

* * *

App. 2

PAGES 1, 48-51 FROM THE DEPOSITION OF PAUL PORTER

(29a-33a of the Record)

UNITED STATES DISTRICT COURT

District of Massachusetts

ROBERT P. HAYES, SR., Administrator,	)	
Plaintiff,	)	FILE NO. 91-10184-MA
vs.	)	
DOUGLAS DYNAMICS, INC.,	)	
Defendant.	)	

DEPOSITION of PAUL PORTER, a Witness called by and on behalf of the Defendant, held pursuant to the Massachusetts Rules of Civil Procedure, before Vincent R. Martino, a Notary Public within and for the Commonwealth of Massachusetts, held at the Law Offices of Whiting & Elinoff, 541 Main Street, South Weymouth, MA, 02190, on Tuesday, July 16, 1991, commencing at 10:00 a.m.

APPEARANCES:

Law Offices of Marc Alpert (By Marc Alpert, Esq.) 141 Tremont Street, Boston, MA 02108

Law Office of John Carroll (By Woodruff Carroll, Esq.) 100 East Washington Street, Syracuse, New York 13202

Whiting & Elinoff (By John Kerr, Esq.) 541 Main Street, South Weymouth, MA 02190

* * *

Q. Sergeant Porter, did you attend the autopsy?

A. Yes.

Q. Did you take any photographs at the autopsy?

A. Yes.

Q. Do you know where those photographs are?

A. No, I do not. They have been lost.

Q. What were they of, those photographs?

[p. 49] A. Two Polaroids of a bruise mark – let me explain this. The area, the exposed skull right behind the right ear of Bob Hayes. To explain that, in an autopsy, they actually after they do the cutting, they actually take the skin, the hair and everything and pull it over so it is down to eye level and they are able to examine the entire skull and there was a bruise, you'll see any bruising that was done. If you are hit here, it leaves a bruise on the inside and there was a bruise right here, right behind the right ear.

Q. Yes.

A. And that was the only bruise. I took two pictures of that. That was the only bruise on the body. As a matter of fact myself and the doctor, the doctor made comment to me that it is really a sin because the boy was in perfect health. There wasn't another mark on his body other than that bruise. If you looked at him without pulling back the skin, other than the monitor to release pressure, his body was fine. He took that off and saw that bruise.

Q. Did you stay for the entire autopsy?

A. Yes.

Q. The entire autopsy?

A. Yes.

Q. Okay.

A. Until we are done.

Q. Did they open up the skull during that autopsy?

A. Yes.

Q. Was there evidence of intercranial bleeding around the brain?

A. I don't recall but I don't – I don't recall. I know there was swelling, we talked of the swelling and that's what caused the death was the swelling.

Q. Okay.

A. I really don't believe there was because we talked about it. It was all the swelling that caused the death. I haven't looked at the autopsy report in years but I think that was the determination.

Q. And did that bruise behind the right ear on Bob Hayes, did that, how did this correspond in location to where I believe you testified you saw contact between his head was at rest with the pillar, the right pillar between the back window and that little corner triangular window of the Tempo? I thought you said you saw that against his head, is that correct?

A. That's just where he was.

Q. Are you saying that coincided with where you saw the contact?

A. He was sitting in the car, the seat was crushed over and he is crushed.

Q. He was bent over?

A. He's bent over like diagonally towards the driver's seat and the pillar is right there. The pillar is leaning right against him.

Q. Okay.

A. Right against the right rear of his ear. That area of the head. That's not the best one to show that.

Q. Okay.

A. I will find it here in a second.

MR. ALPERT: We were talking about, for the record, Exhibit 21.

MR. KERR: I just was holding it. He made no reference to it.

THE WITNESS: Exhibit 22.

Q. Is this the pillar here that you are talking about?

A. I believe so. I believe so. I'm looking at it here, I believe it is this here if this is one in the same. It is hard to tell with these pictures. There is the floor. There is the seat. I believe –

Q. Or this one here?

A. Here.

Q. The white one you see referring to Exhibit 21?

A. And 22.

* * *

TESTIMONY OF SERGEANT PAUL PORTER (RANDOLPH POLICE DEPARTMENT)

(214a of the Record)

Sergeant Porter testified at his deposition on July 16, 1991 at pages 47 and 48 as follows:

Page 47:

Q. . . . [D]id you see any evidence during your observation of the [sic] either the back of the Tempo or the front of the truck that had the plow frame on it, that the plow frame and specifically the arm on the plow frame that attaches to the plow, entered the rear of the Tempo?

A. I don't recall any specific physical evidence . . .

* * *

Page 48:

Q. You didn't see any specific physical evidence [on the Tempo] conforming to the shape of the plow frame?

A. I did not.

* * *

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EXCERPTS FROM PAGES 54 AND 55 OF OFFICER THISTLE'S DEPOSITION TRANSCRIPT

(213a of the Record)

* * *

Page 54:

Q. Did you see any evidence when you examined the Tempo to indicate that the plow frame, itself, entered the passenger compartment?

A. To my knowledge, no.

Q. Did you see any evidence that the plow frame even impacted the back of the Tempo; on the Tempo, I'm talking about, did you see any evidence of –

A. I didn't look for any specific evidence of the plow frame damaging the Tempo, just the front end of the Ford damaged the rear end of the Tempo.

* * *

Page 55:

Q. Even though you weren't looking for it, you didn't notice any particular evidence that the plow frame in fact made any particular damage to or caused any particular damage to the back of the Tempo?

Objection by the plaintiff's counsel.

A. No, I did not.

. . . .

Q. . . . did you observe any particular damage to any part of the plow frame on the front of the truck?

A. I didn't make note of any.

Q. And you don't today have a memory of any.

A. Particular damage, no.

* * *

EXCERPT FROM PAGE 55 OF THE DEPOSITION TESTIMONY OF WILLIAM RICHARDSON (DRIVER OF THE TRUCK)

(214a of the Record)

Mr. Richardson testified at his deposition on October 4, 1991 at page 55 as follows:

Page 55:

* * *

Q. Were you able to see the actual impact of the lift channel on the Ford vehicle as the crash occurred?

A. No.

* * *

PAGE 87 OF THE DEPOSITION OF WILLIAM RICHARDSON, DRIVER OF PICKUP TRUCK

(460a of the Record)

* * *

statement earlier about the tempo. Was the tempo moving at the time of the impact?

A. It was either slowing down – just coming to almost a stop or it was stopped.

Q. Now, you testified at one point about the lift arm. And then you testified that you couldn't look over the front. Could you see the lift arm at the point of impact? Just yes or no.

A. No.

Q. Did you actually see the lift arm impact on the back of the tempo or the back of the white Ford car?

A. No. That's like looking across the table and see'ing what he has on his belt buckle. I can't see down and over. Being the further most part of the truck, it's a very unreasonable assumption.

Q. Was the reason that you couldn't see because it was down below the front of the rise of the hood?

A. Yes. The arm was sitting like so (indicating).

Q. Did you observe after the accident whether the lift arm had sustained any damage?

A. After the accident, no. I got arrested.

* * *

(229a of the Record)

ANNEXED TO DEFENDANT'S STATEMENT OF MATERIAL FACTS--
MILTON MEDICAL CENTER EMERGENCY ROOM RECORD.

MILTON MEDICAL CENTER
MILTON, MASSACHUSETTS
EMERGENCY ROOM RECORD

☐ EMERGENT ☐ SEMI-URGENT ☐ OUTPATIENT
☐ URGENT ☐ APPOINTED ☐ TRIAGE

PATIENT NAME & ADDRESS: HAYES, ROBERT P
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498 SS NO.

RELATIVE, PARENT-GUARDIAN NAME & ADDRESS: HAYES, MARY
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498 REL MOTHER

GUARANTOR'S EMPLOYER NAME & ADDRESS: HAYES, ROBERT C
7 JANE ST
RANDOLPH MA 02368
PHONE NO. 961-5498

ADMIT DATE: 01/30/88 | ARRIVAL TIME: 5:46 PM | MEDICAL RECORD#: 143301 | ACCOUNT NO.: 00143051
SEX: M | D.O.B.: 02/01/73 | AGE: 15 | OCCUPATION: STUDENT
MARITAL: S | REL.: C | FAMILY PHYSICIAN:
ATTENDING PHYSICIAN: SLAGER, MICHAEL
PRIMARY INSURANCE: HEALTHWAY | POLICY NO.:
SECONDARY INSURANCE: | POLICY NO.:
NAME OF SUBSCRIBER: HAYES, ROBERT
INJURY DATE: 01/30/88 | PLACE INJURY OCCURRED:

INSURANCE ADDRESS:
EMPLOYER NAME & ADDRESS:

CONDITION ON ARRIVAL: CONSCIOUS ☐ YES ☐ NO | AMBULATORY ☐ YES ☐ NO | BROUGHT BY ☐ SELF ☐ FIRE Randolph ☐ POLICE ☐ AMBULANCE ☐ OTHER | LAST TETANUS 4/10 | TREATMENT RM T

ALLERGIES: NKA

CURRENT MEDS: NKA

PAST MED HX: Stuffy nose occ.

	MEDS GIVEN	DOSAGE	TIME	BY
#1 BP 118/66 T P 57 R	Demerol	20 IV	5:55 pm	
#2 BP T P R				

NURSING ASSESSMENT: Pt arrived by EMS c/o MVA - pt was restrained driver in MVA - c/o head pain, neck pain, back pain, and left knee pain. Pt alert and oriented x 3 at this time. Skin warm and dry. Resp. unlabored. Pt ambulatory on arrival. Pt placed in room #16A (R) and instructed to undress and put on gown. Family at bedside.

ATTENDING NURSE'S SIGNATURE: Sheila Tobin

HISTORY & MEDICAL EXAM TIME:
Pt arrives s/p victim in MVA, was back seat passenger on seat belt side. Car was struck by a truck, reportedly with great force.
Pt arrives c/o neck pain with spontaneous regular respirations. Color is good. Pupils are fully dilated & reactive. Neg. LOC reported.
No external evidence of chest trauma or facial trauma.
Minimal muscular contractions of legs to pain - No spontaneous movement to legs noted.
Lungs CTA - breath sounds equal, clear.
No deformities of chest wall. Chest soft, nontender, no crepitus.
Xrays of knee (R) knee, chest, left hip, left knee to be done.
Discussed w Dr. Sumter at MGH. Will transfer pt.
Hct - 47
20 mg IV Demerol
Morphine 25 mg IV

DIAGNOSIS: MVA, Multiple Trauma

INSTRUCTIONS TO PATIENT: Foley catheter - urine specimen sent to lab. Intubated and transferred to MGH via ambulance.

V + C
1. Sounds.
2.
3. Lt C-spine
1. Lt C-spine
2. Cervical C-7
3. C-Spine with out (R) elbow

INSTRUCTION SHEET GIVEN
☐ WOUND ☐ HEAD ☐ DIET
☐ SPRAIN ☐ BACK
☐ NOSEBLEED ☐ CAST

DISPOSITION
☐ HOME ☐ ADMIT ☐ TRANSF

REFERRED TO

R.N. NAME	DOCTOR'S SIGNATURE	PATIENT SIGNATURE	DATE	TIME DISCHARGED
PATIENT VERBALIZES UNDERSTANDING OF INSTRUCTIONS	[signature], M.D.			

MILTON MEDICAL CENTER FORM 60 REV. 2/88

F33.8

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